DECISION

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

JOHN MANSOUR and HELGA-ROSWITHA MANSOUR

Plaintiffs, INDEX NO. 13559/87

vs.

ROBERT ABRAMS, RONALD GOLDSTOCK and MARTIN MARCUS,

Defendants.

APPEARANCES

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Pro se, and as attorney
for Helga-Roswitha Mansour

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State of New York
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DECISION

David O. Boehm, J.

The plaintiff, John Mansour, joined the New York State Organized Crime Task Force (Task Force) as an Assistant Attorney General in 1970, serving at the pleasure of the Attorney General. On June 30, 1981, defendant, Ronald Goldstock, was appointed by the Governor and the Attorney General, defendant Robert Abrams, to head the Task Force. A year later, on July 1, 1982, defendant, Martin Marcus, was hired as First Assistant in charge of Field Operations.

The Task Force had been without a permanent director for eight years before Goldstock was appointed, and was described in a study by the Battelle Memorial Institute as "moribund" for much of its existence (Defendants' Exh. T., p 36). After his appointment, Goldstock obtained a larger budget, hired additional staff and implemented a major reorganization involving the formation of investigative teams comprised of investigators, accountants, analysts and lawyers. Under the team structure, decisions involving investigations and prosecutions were be made by consensus. Although deferred to on legal matters, the attorney team member no longer had line authority over non-legal professional staff. Disputes among team members were resolved by Marcus and Chief Investigator, Fred Rayano, and, if necessary, by Goldstock. Goldstock and Marcus were involved with the details of all investigations, and they, together with Rayano, regularly visited the regional offices.

Prior to Goldstock's appointment, the plaintiff had been the de facto supervisor of the staff at the Rochester regional office. However, after the reorganization, he was assigned as team attorney with the Financial Crimes Team for the Task Force's western region, headquartered in Buffalo.

Performance evaluations prepared by Marcus indicate that the plaintiff did not perform well within the team structure. The evaluations noted that plaintiff's morale was low, that he failed to

provide adequate legal support for his team, did not take an active role in his team's investigations and that, as a result, friction developed between him and the other members of the team.

Due to plaintiff's evaluated performance, it was decided to terminate his employment. On October 26, 1983, during a performance evaluation meeting with plaintiff, Marcus told him to find a new job and that he had until February 1, 1984 to do so. The deadline passed without plaintiff obtaining new employment and was extended to March 7, 1984.

Following his termination, plaintiff commenced this action seeking damages for defamation, interference with contractual rights and, under Section 1983, for violation of his civil rights. Defendants have moved for summary judgment dismissing the complaint, and plaintiff cross-moved for partial summary judgment and for leave to amend his complaint.

At oral argument, defendants were granted summary judgment dismissing plaintiff's defamation and interference with contractual rights causes of action and the civil rights claim against Abrams. Decision was reserved on the other portions of their motions.

The amended complaint and plaintiff's affidavit submitted on this motion set forth that on a number of occasions plaintiff expressed himself on matters of public concern, and that such expressions were a substantial factor in defendants' decision to discharge him. Specifically plaintiff alleges that he refused instructions from Marcus and Goldstock to present a matter to a Grand Jury because the Grand Jury had no power to consider the matter; that he disagreed with Marcus whether there was sufficient evidence to obtain an indictment in Monroe County for criminal possession of stolen property against a suspect because there was no proof of possession in Monroe County; that he accepted an attorney's offer to surrender his client for arraignment,

despite protests from a Task Force investigator who wanted to arrest the individual late on a Friday so that he would have to remain in jail over the weekend as a means of pressuring him into cooperating with an ongoing investigation; that he recommended the return of items seized pursuant to a search warrant when they were later found to have no evidentiary value, despite the wishes of other Task Force members who wanted to retain the items indefinitely to put pressure on the owner; that he objected to the use of subpoenas to compel individuals to travel to the Task Force Office in Buffalo for informal interviews; that he advised against initiating an investigation proposed by Marcus involving wiretaps and requiring extensive manpower, where the subject of the investigation was already awaiting imminent trial in Federal Court; that he disagreed with Marcus' instruction that interviews disclosing potentially exculpatory information should not be preserved; and, that he suggested an allegedly stolen truck engine be inspected by an expert to determine its value and condition to test the owner's claim that it was damaged and to ascertain the difference between its value and the amount the owner paid.

Defendants motion to dismiss raises the objection that plaintiff's allegations reveal only areas of disagreement and dissatisfaction which do not constitute protected First Amendment speech. Defendants further argue that they are, in any event, protected by a qualified immunity.

Although, generally, an employer has an unfettered right to terminate an at-will employee, the employee may not be terminated for a constitutionally impermissible reason (see, *Mt. Healthy City School District Board of Ed. v Doyle*, 429 US 274; *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 305). It is well settled that public employment may not be made subject to conditions which infringe upon an employee's constitutionally protected right of freedom of expression (*Keyishian v Board of Regents*, 385 US 589, 605-606). To determine whether such a

right has been violated, it is necessary to balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees" (*Pickering v Board of Education*, 391 US 563, 568).

Before such balancing is required, however, the court must initially decide whether the speech at issue touches upon a matter of public concern. If it does not, it is not entitled to First Amendment protection (see, *Giacalone v Abrams*, 850 F2d 79, 86). When an employee's expression does not relate to a "political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment" (*Connick v Myers*, 461 US 1____, 146).

Whether speech involves a matter of public concern is determined by its content, form and context (Id at 147-148). The inquiry focuses on the extent to which the employee speech "was calculated to disclose wrongdoing or inefficiency or other malfeasance on the part of governmental officials in the conduct of their official duties" (*Koch v City of Hutchinson*, 847 F2d 1436, 1445), and whether the employee was speaking as "a concerned public citizen, informing the public that the state institution is not properly discharging its duties . . . or merely as an employee, concerned only with internal policies or practices which are of relevance only to the employees of that institution" (*Cox v Dardanelle Pub. School Dist.*, 790 F2d 668, 672, cert den 488 US 909).

Initially, the burden is on plaintiff to show that his speech was constitutionally protected, and that it was a substantial or motivating factor in the defendants' decision to terminate him. If plaintiff meets that burden, defendants must then show by a preponderance of the evidence that they would have reached the

same decision even in the absence of the protected speech (*Mt. Healthy City School District Bd. of Educ. v Doyle*, 429 US, 274, 287, *supra*).

On a prior appeal, the Appellate Division held that the disagreement over the presentation to the Grand Jury of the matter involving a former public employee "clearly involved a matter of public concern", noting that the Grand Jury has no power to consider a report where the subject is no longer a public employee (*Mansour v Abrams*, 144 AD2d 905, 906).

The Appellate Division's conclusion is also consistent with the holding in *Giacalone v Abrams* (850 F2d 79, *supra*), which involved statements by an Assistant Attorney General expressing concern that a litigation strategy formulated by his superiors was legally unauthorized and ethically improper. Although acknowledging that it presented a close question, the *Giacalone* court concluded that such statements touched upon matters of "colorably public concern" (Id at 86).

The Appellate Division did not, however, decide whether any of the other matters set forth by the plaintiff were matters of public concern. Most of them appear to involve disagreements over the internal affairs of the Task Force. Disagreements over a criminal possession of stolen property charge; whether the Task Force should have arrested an individual or allowed him to surrender; whether an extensive investigation should be conducted when the subject was facing an imminent trial in Federal Court; and whether an expert should have been retained to examine a truck engine, do not evidence any illegal or unethical conduct by the Task Force, nor does plaintiff allege that they do. Clearly, therefore, they are not matters of public concern. Every criticism by a public employee directed at his superiors does not "plant the seed of a constitutional case . . . . [T]he First Amendment does not require a public office to be run as a roundtable for employee

complaints over internal office affairs" (*Connick v Myers*, 461 US 138, 149, *supra*).

Likewise, plaintiff's opposition to the use of subpoenas requiring that people be examined at the Task Force office in Buffalo is no more than a disagreement over internal office affairs. Subdivision 4 of Executive Law §70-a authorizes the issuance of subpoenas to compel witnesses to attend hearings "at any place within the state". Plaintiff's contention that subpoenas should not be employed for conducting what he terms "informal hearings" is not supported by subdivision 4, which states that "[e]very witness . . . shall be examined privately and the particulars of such examination shall not be made public". His reliance upon case law involving the more limited subpoena power of District Attorneys (e.g., *Drake v City of Rochester*, 96 Misc 2d 86, affd 74 AD2d 996; *People v Arocho*, 85 Misc 2d 116) is misplaced.

However, the disagreement over the return of items seized pursuant to a search warrant presents a close question. Generally, "property seized pursuant to a search warrant technically remains in the custody of the court, and the District Attorney or property clerk possesses the property only as an officer of the court, subject to the court's direction and disposition" (*Matter of Documents Seized Pursuant to Search Warrant*, 124 Misc 2d 897). The plaintiff does not contend that the initial seizure was unlawful, unlike the case on which he relies (*Matter of B.T. Prods. v Barr*, 44 NY2d 226 [Organized Crime Task Force lacked authority to obtain a search warrant without prior authorization from the Governor and local District Attorney]). Nor does he present any authority holding that law enforcement officials possessing property lawfully seized are obligated to return the property before a court directs such relief (see, *Boyle v Kelley*, 42 NY2d 88 [an Article 78 proceeding for mandamus or an action for replevin are appropriate legal remedies to obtain the return of

property]). However, since the alleged motivation for the continued retention of the items had nothing to do with their evidentiary value, but was done solely to pressure the owner to cooperate with an investigation, plaintiff's concern about the propriety of retaining the items would appear to involve a matter of public concern. Such coercive tactics by the government, at the very least, warrant public scrutiny.

The deliberate failure, as a matter of policy, to preserve exculpatory evidence concerning suspects in a Task Force investigation unquestionably involves a matter of public concern. Suppression by the prosecution of evidence favorable to an accused violates due process "irrespective of the good faith or bad faith of the prosecution" (*Brady v Maryland*, 373 US 83, 87), A prosecutor's obligation to disclose exculpatory evidence to a criminal defendant also includes "a correlative 'obligation to preserve evidence until a request for disclosure is made' " (*People v Martinez*, 71 NY2d 937, 940; quoting *People v Kelly*, 62 NY2d 516, 520). The failure of a governmental agency to preserve potentially exculpatory evidence violates a defendant's due process rights, regardless of whether he was suspect at the time the evidence was obtained (*People v McCann*, 115 Misc 2d 1025). Since "the State has no interest in interposing any obstacle to the disclosure of the facts" (*People v Rosario*, 9 NY2d 286, 290, quoting *People v Davis*, 52 Mich 569, 573), the dubious policy of systematically failing to make a record of exculpatory evidence violated a clear legal duty to do so, and plainly involves a matter of public concern.

In this context, it is well to remember the admonitory words of Justice Brandeis. "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy" (*Olmstead v United States*, 277 US 438, 485 [dissent]).

Because three of the subjects about which plaintiff expressed his views, and for which he was allegedly terminated, involve matters of public concern, it becomes necessary to balance plaintiff's interest in commenting upon them against the interest of the State in promoting efficiency. However, before this is done, the threshold factual question of the basis for plaintiff's termination must be resolved (*Mansour v Abrams*, 144 AD2d, 905, 906, *supra*).

The defendants do not concede that plaintiff's employment was terminated for the reasons alleged in the complaint. In their affidavits, Goldstock and Marcus both give a multitude of general reasons for plaintiff's discharge (Goldstock's affidavit, ¶37; Marcus' affidavit, ¶25). They then refer the court to their deposition testimony which, combined, totals nearly 1,200 pages.

Unfortunately, the general statements in Goldstock's and Marcus' affidavits totally fail to indicate whether the three matters of public concern set forth in the complaint served as a basis for plaintiff's termination. In fact, their statements in the affidavits submitted in this motion are identical to those presented on the prior appeal to the Appellate Division (see, *Mansour v Abrams*, 144 AD2d 905, *supra*, [Record on Appeal, pp 15, 23]), where that court declined to apply the balancing test until the threshold factual question of the basis for plaintiff's termination was resolved (*Id.*, at 906).

The obligation which the Attorney General attempts to foist upon the court of reading all 1,200 pages of the deposition transcripts is rejected. It is not incumbent upon this or any court to search the deposition transcripts to ascertain if the defendants may have specifically addressed whether plaintiff was discharged for the reasons he alleges. The statutory standard of establishing a defense "sufficiently to warrant the court as a matter of law in directing judgment" (CPLR 3212, subd [b]) is not met by reli-

ance upon deposition transcripts which, without proper affidavits, impose an intolerable burden on the court (*Stainless, Inc. v Employers Fire Ins. Co.*, 69 AD2d 27, 32, affd 49 NY2d 924).

Apart from the inadequacy of defendants' moving papers, summary judgment is usually inappropriate in cases involving potentially unconstitutional motivations (see, *Tovar v Billmeyer*, 721 F2d 1260, 1264). This is especially true in cases such as this, where the termination followed 27 months of strained relationships and several separate expressions of protected speech (see, *Peacock v Duval*, 694 F2d 644, 646), rather than after a single remark (see, e.g., *Rankin v McPherson*, 483 US 378; *Connick v Myers*, 461 US 138, *supra*; *Pickering v Bd. of Educ.*, 391 US 563 *supra; Giacalone v Abrams*, 850 F2d 79, *supra*). The necessary fact-finding hearing required denial of defendants' as well as plaintiff's motion for summary judgment.

Nevertheless, the parties contend that, although factual issues may preclude summary resolution of plaintiff's section 1983 claim, the court may decide whether defendants are protected by a qualified immunity. The qualified immunity defense shields government officials performing discretionary functions from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" (*Harlow v Fitzgerald*, 457 US 800, 818). Application of the defense focuses on the "objective legal reasonableness" of an official's action, assessed by a consideration of whether the law at the time was "clearly established" (*Anderson v Creighton*, 483 US 635, 639). The rule is intended to enable government officials " 'reasonably [to] anticipate when their conduct may give rise to liability for damages' . . . [and to] know that they will not be held personally liable as long as their actions are reasonable in light of current American law" (Id., at 646, quoting *Davis v Scherer*, 468 US 183, 195).

The parties' contention that the issues of qualified immunity need not await a determination of the reasons for plaintiff's discharge is supported by the immunity's objective; it is intended not as a mere defense to liability, but rather as an immunity from suit (*Mitchell v Forsyth,* 472 US 511, 526). Thus, ordinarily, a court should resolve the issue of qualified immunity at the earliest possible stage in the litigation, even before discovery, and grant a motion to dismiss where the allegations of illegal conduct in the complaint are such that a reasonable official would have believed his actions lawful (*Anderson v Creighton*, 483 US 635, 646, n 6, *supra*).

However, on an earlier appeal of this case, the Appellate Division denied defendants' summary judgment motion, predicated on the defense of qualified immunity. After noting defendants' claim that the plaintiff was fired for an "array of reasons", the Appellate Division stated that because the threshold factual question of the basis for plaintiff's termination was unresolved, "we do not reach the issue of whether defendants are entitled to summary judgment based on their defense of qualified immunity . . . ." (*Mansour v Abrams,* 144 AD2d 905, 906, *supra*).

Since then the parties have conducted extensive discovery, but the basis for plaintiff's termination remains in question. Accordingly, the issue of qualified immunity will be held in abeyance until after trial.

For all of the foregoing reasons the defendants' motions and plaintiff's cross-motion for summary judgment are, therefore, denied.

Accordingly, the process will operate as follows: first a trial to determine the reason for plaintiff's discharge and, if it appears his discharge was in no way related to a matter of public concern, a *Pickering* balancing test will not be needed. If it is determined

that plaintiff's discharge was related to a violation of his First Amendment rights, then a *Pickering* balancing test will be required. If, after such test, it appears that plaintiff's First Amendment rights prevail over the necessity of defendants to operate and maintain an efficient organization, it will then become necessary to examine the issue of defendants' qualified immunity. In so doing, it will be necessary to determine by an objective test whether defendants should have known, under the law as it existed in October 1983, that they were violating plaintiff's constitutional rights.

Plaintiff also seeks leave to amend his complaint to add, as an additional remedy, reinstatement with full back pay and benefits, in addition to the monetary damage award originally sought as relief under his section 1983 cause of action.

Leave to amend pleadings should be freely given absent prejudice or surprise resulting directly from the delay (CPLR 3025, subd [b]; *McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp.*, 59 NY2d 755). Although, generally, it is inappropriate to review the merits of a proposed amendment, leave to amend will be denied where the proposed amendment "is clearly and patently insufficient on its face" (*Newton v Aqua Flo Co.*, 106 AD2d 919, 920).

A Section 1983 action which seeks monetary award payable out of state funds is deemed a suit against the state, and is barred by the Eleventh Amendment of the Constitution. However, where such action seeks judgment against a state official in his individual capacity, or requests prospective injunctive relief, it is not deemed a suit against the state and, therefore, is not prohibited (*Will v Michigan Dept. of State Police*, __US__, 109 S Ct 2304, 2311; *Kentucky v Graham*, 473 US 159, 167).

That portion of plaintiff's proposed amendment for back pay necessarily seeks a monetary award against the state because the

defendants, as individuals, are not personally responsible for such payment (see, *Dwyer v Regan,* 777 F2d 825, 836, mod on other grds, 793 F2d 457). Accordingly, to the extent the proposed amendment seeks to recover back pay, leave to amend is denied.

Reinstatement, however, "is purely prospective injunctive relief that orders the state official to return the former employee to the state payroll" and, as such, it is not barred by the Eleventh Amendment (*Dwyer v Regan*, 777 F2d 825, 836, *supra*).

The defendants contend that, because suit was brought against them in their individual rather than in their official capacity, the relief sought is time barred. Although suit was admittedly brought against the defendants solely in their individual capacities, the capacity in which a person is designated as a party may be changed by amendment (see, *Brandon v Holt*, 469 US 464, 471 [petitioners in section 1983 action were permitted to amend their pleadings to conform to proof and name the Director of Police in his official capacity]). Furthermore, as a general rule, amendments changing only the capacity in which a party appears relate back to the original pleading insofar as the statute of limitations is concerned (1 Weinstein-Korn-Miller, *N Y Civ Prac*, §203.34).

Granting plaintiff leave to amend does not foreclose defendants from subsequently testing the merits of the amendment, either by a motion to dismiss or for summary judgment. However, now is not "the occasion for disposing of the merits of the new matter" (Siegel, *Practice Commentaries,* McKinney's Cons Laws of NY, Book 7B, C3025:11, p 361).

Defendants oppose amendment on the further ground of prejudice, claiming that an amended answer may be required as well as further discovery, which may be impossible since plaintiff has filed a note of issue and statement of readiness. Defendants also project the looming spectre of a motion to dismiss and possible appeals.

To successfully oppose a motion to amend, defendants must demonstrate that they have been "hindered in the preparation of [their] case or [have] been prevented from taking some measure in support of [their] position" (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23). The potential of necessary further pleadings or proceedings is not the test. Since the court always has discretion to vacate a note of issue to permit further discovery (22 NYCRR §202.21 [e]), defendants' claim of prejudice is insufficient to defeat plaintiff's motion. Plaintiff's motion to amend is, therefore, granted to the extent it seeks to add the remedy of reinstatement.

Submit order in accordance with this decision.

Dated: May 22, 1991

s/ David O. Boehm

David O. Boehm
Supreme Court Justice